

1 **FOR PUBLICATION**

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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re:) ADV. CASE NO. 97-90691-H7
11 Dolores Ercelia Briles,)
12 Debtor.) MEMORANDUM DECISION
13 Related Bankruptcy Court)
14 Case No. 97-07316-H7)
15 Eleanor F. Stevens,)
16 Plaintiff,)
17 v.)
18 Dolores Ercelia Briles,)
19 Defendant.)
20

21 Plaintiff Eleanor F. Stevens ("Stevens") moves for summary
22 judgment against Dolores Ercelia Briles ("Debtor") on the grounds
23 that collateral estoppel applies to a pre-petition arbitrator's
24 award in Stevens' favor.

25 This Court has jurisdiction to determine this matter pursuant
26 to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order No. 312-D of
27 the United States District Court for the Southern District of
28 California. This is a core proceeding pursuant to 28 U.S.C.

1 § 157(b)(I).

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3 FACTS¹
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5 In 1988, Debtor, a licensed real estate broker, represented
6 Stevens and her husband in the sale of their property to Jose
7 Aguilar and his wife ("Aguilars"). The Stevens took back two notes
8 from the Aguilars as part of the purchase price.

9 In 1990, Debtor, representing the Aguilars, arranged a
10 purchase of property in Bonsall, California. Debtor's commission
11 was \$22,000 if the sale closed. The Aguilars, however, were unable
12 to obtain the entire amount required for the down payment.

13 Debtor contacted Mr. Stevens and asked him to consider lending
14 \$50,000 to the Aguilars. Mr. Stevens agreed. The loan was to be
15 secured by a second deed of trust on the Aguilar home on Maryland
16 Street. Debtor represented the Maryland Street property had
17 equity in excess of \$100,000. At the same time, a second
18 transaction was arranged where one of the notes from the 1988
19 transaction would be transferred from one property owned by the
20 Aguilars to a second position on the property purchased from
21 Stevens in 1988.

22 Debtor arranged an escrow at Essex Escrow for the Stevens-
23 Aguilar transactions, a different escrow company from the one
24 processing the Aguilar purchase of the Bonsall property. Debtor
25 advised Essex Escrow that no title insurance or title search would
26

27 ¹ The following facts are largely taken from the Decision and Award of
28 Arbitrator, Gerald L. Lewis ("Arbitrator"), dated March 12, 1997. The Arbitrator's
award became a final judgment in the amount of \$80,942.89 and was entered September
10, 1998.

1 be necessary. Debtor had the escrow instructions prepared to
2 reflect that there would be no title search or title insurance.
3 Debtor also instructed that the deed of trust in favor of Stevens
4 would not be recorded by the escrow company at the time the Aguilar
5 loan transaction closed, but would be delivered to Debtor
6 unrecorded for Stevens' benefit.

7 Although Debtor contended she was only serving as an
8 interpreter in the transaction and that she was doing this "not as
9 a realtor but just as a courtesy", the Arbitrator found Debtor was
10 acting as an agent for both parties in the loan transaction. The
11 Arbitrator also found Debtor's apparent motivation was to keep her
12 commission from being lost by the transaction falling through. To
13 that end, arrangements were made so that Aguilar's lender on the
14 Bonsall purchase would not become aware, through title searches,
15 escrows or otherwise, that the last \$50,000 of Aguilar's down
16 payment had come from yet another loan. The plan was to have the
17 trust deed from Aguilar to Stevens recorded only after the Bonsall
18 purchase closed on March 23, 1990. The Stevens' trust deed was not
19 recorded until April 24, 1990.

20 In the meantime, the Internal Revenue Service ("IRS") recorded
21 a lien against the Bonsall property in the amount of \$137,000 on
22 April 20, 1990. Consequently, Stevens' security interest in
23 Aguilar's property became junior to the IRS's. In 1991, the IRS
24 foreclosed on Aguilar's property eliminating Stevens' security
25 interest.

26 In 1994, Stevens filed suit against Debtor in the San Diego
27 Superior Court for damages resulting from Debtor's failure to
28 record Stevens' trust deed in a timely manner. Stevens and Debtor

1 agreed to resolve their dispute via binding arbitration. In March
2 of 1997, the Arbitrator awarded \$76,535.60 in Stevens' favor.
3 Debtor subsequently filed her petition under Chapter 7 of the
4 Bankruptcy Code. Stevens initiated this adversary complaint
5 alleging that the debt was nondischargeable under 11 U.S.C.
6 § 523(a)(4).

8 DISCUSSION

10 A. STANDARD FOR SUMMARY JUDGMENT.

11 Rule 56(c) of the Federal Rule Civil Procedure ("FRCP") made
12 applicable to adversary proceedings by Fed. R. Bankr. P. 7056,
13 provides that summary judgment:

14 [S]hall be rendered forthwith if the pleadings,
15 deposition, answers to interrogatories, and
16 admissions on file, together with the
17 affidavits, if any, show that there is no
genuine issue as to any material fact² and that
the moving party is entitled to a judgment as a
matter of law.

18 FRCP 56(c).

19 B. COLLATERAL ESTOPPEL.

20 Stevens seeks to except from discharge the final judgment in
21 the amount of \$80,942.89 based on collateral estoppel.

22
23 ² A genuine issue of material fact exists if the evidence is such that
24 a reasonable jury could return a verdict for the non-moving party. Anderson v.
25 Liberty Lobby, Inc., 477 U.S. 242 (1986). The evidence favoring the non-moving
26 party must be more than "merely colorable." Id. When the moving party has carried
27 its burden under the rule, its opponent must do more than simply show there is some
28 metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co. v. Zenith
Radio, 475 U.S. 574 (1986). Essentially, the question in ruling on a motion for
summary judgment is whether the evidence presents a sufficient disagreement to
require submission to a jury or whether it is so one-sided that one party must
prevail as a matter of law.

1 Collateral estoppel applies in bankruptcy proceedings. Grogan v.
2 Garner, 498 U.S. 279, 284 (1991); In re Graham, 973 F.2d 1089, 1097
3 (3rd Cir. 1992). "In determining the collateral estoppel effect of
4 a state court judgment, federal courts must, as a matter of full
5 faith and credit, apply that state's law of collateral estoppel."
6 In re Bugna, 33 F.3d 1054, 1057 (9th Cir. 1994). A confirmed
7 arbitration award has the same force and effect as a state court
8 judgment. Cal.Civ.Proc. Code § 1287.4 (West 1998); Early Walter v.
9 Nat'l Indem. Co., 3 Cal.App.3d 630, 634 (1970).

10 Under California law, collateral estoppel requires that : (1)
11 the issue sought to be precluded from relitigation must be
12 identical to that decided in a former proceeding; (2) the issue
13 must have been actually litigated in the former proceeding; (3) it
14 must have been necessarily decided in the former proceeding; (4)
15 the decision in the former proceeding must be final and on the
16 merits; and (5) the party against whom preclusion is sought must be
17 the same as, or in privity with, the party to the former
18 proceeding. In re Kelly, 182 B.R. 255, 258 (9th Cir. BAP 1995),
19 aff'd, 100 F.3d 110 (9th Cir. 1996). "The party seeking to assert
20 collateral estoppel has the burden of proving all the requisites
21 for its application." In re Berr, 172 B.R. 299, 306 (9th Cir. BAP
22 1994) (citations omitted). "To sustain this burden, a party must
23 introduce a record sufficient to reveal the controlling facts and
24 pinpoint the exact issues litigated in the prior action." Id. Any
25 reasonable doubt as to what was decided by a prior judgment should
26 be resolved against using it as an estoppel. Id.

27 There is no dispute that the arbitration award resulted in a
28 final judgment. There is also no dispute that Debtor was a party

1 in the underlying action. Therefore, the only question before the
2 Court is whether the arbitration award involved the identical
3 issues that are required to establish fraud or defalcation while
4 acting as a fiduciary under the standards of § 523(a)(4). To
5 determine whether issues in prior and subsequent proceedings are
6 identical, for purposes of collateral estoppel, the Court examines
7 whether the requirements of proving the issue at stake in the
8 subsequent proceeding "closely mirror" requirements of proving
9 issues presented in the prior action. In re Nourbakhsh, 162 B.R.
10 841, 844 (9th Cir. BAP 1994).

11 C. SECTION 523(a)(4).

12 Bankruptcy Code § 523(a)(4) provides:

13 A discharge under section 727, . . . of this
14 title does not discharge an individual debtor
from any debt ---

15 (4) for fraud or defalcation while acting in a
16 fiduciary capacity . . .

17 The elements under § 523(a)(4) include (1) the existence of a trust
18 res, or identifiable sum of money, In re Evans, 161 B.R. 474 (9th
19 Cir. BAP 1993); (2) the existence of a fiduciary relationship, In
20 re Woosley, 117 B.R. 524, 529 (9th Cir. BAP 1990); (3) defalcation;
21 or (4) fraud.

22 1. Trust Res.

23 "A trust is defined as 'a fiduciary relationship with
24 respect to property, subjecting the person by whom the title to
25 property is held to equitable duties to deal with the property for
26 the benefit of another person...." Evans, 161 B.R. at 478
27 (citation omitted). A "requirement of a trust relationship is a
28 trust res -- money or property that is entrusted to the debtor-

1 fiduciary." Id. (citations omitted). Therefore, there must be a
2 finding of the existence of a trust res, or identifiable sum of
3 money, under § 523(a)(4). Id. citing In re Schneider, 99 B.R. 974
4 (9th Cir. BAP 1989) (funds that the creditor provided the debtor
5 for investment constituted the trust res for purposes of section
6 523(a)(4)).

7 The Arbitrator's award does not specifically refer to the
8 trust deed as a "trust res". Nonetheless, the Arbitrator's award
9 makes clear that Debtor received the trust deed on behalf of the
10 Stevens. The Arbitrator found that "there is no evidence that Mr.
11 and Mrs. Stevens ever got the trust deed to record, so the
12 circumstantial evidence is that the recording was done at the
13 direction of, if not by, defendant Briles." The Arbitrator went on
14 to find that the "Stevens relied on Briles to get the trust deed
15 recorded without prejudice to Stevens' security position."

16 At the time of the transaction, Debtor represented to Stevens
17 that the Maryland Street property had equity in excess of \$100,000.
18 Had the trust deed been recorded when the equity was still intact,
19 it would have been worth the amount of the loan, or \$50,000. A
20 number of bankruptcy courts have found that a real estate broker
21 who receives funds from his or her client for a specific purpose
22 acts as a fiduciary under § 523(a)(4) with respect to those funds.
23 See In re Niles, 106 F.3d 1456 (9th Cir. 1997); Woosley, 117 B.R.
24 at 524. The same result should follow for a real estate broker
25 who, acting within the scope of her licensed activities, receives a
26 trust deed for the specific purpose of recording it.

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1 2. Fiduciary Relationship.

2 California Business & Professional Code § 10131³ creates a
3 fiduciary relationship between a real estate broker and his/her
4 clients which makes a judgment of fraud or defalcation
5 nondischargeable. A "real estate license carries with it fiduciary
6 obligations to [one's] principals under California law when
7 carrying out licensed activities." Woosley, 117 B.R. at 529. The
8 Woosley court noted:

9 With respect to licensed activities, real
10 estate licensees have the same obligations as
11 trustees under California law, including duties
12 to refrain from making misrepresentations or
13 obtaining any advantage over their principals,
14 and to make the fullest disclosure of all
15 material facts concerning the transaction that
16 might affect their principal's decision.

17 Id. Despite Debtor's arguments to the contrary, the Arbitrator
18 found that Debtor was acting as an agent for both the Aguilar and
19 the Stevens in the transaction. Therefore, because Debtor was
20 acting within the scope of her licensed activities and received
21 property on behalf of Stevens, the existence of a fiduciary
22 relationship for purposes of § 523(a)(4) has been established.

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24 ³ Cal.Bus.& Prof. Code 10131 provides in relevant part:

25 A real estate broker within the meaning of this part is
26 person who, for a compensation or in expectation of
27 compensation, regardless of the form or time of payment,
28 does or negotiates to do one or more of the following acts
 for another or others:

 (d) Solicits borrowers or lenders for or negotiates loans
 or collects payments or performs services for borrowers or
 lenders or note owners in connection with loans secured
 directly or collaterally by liens on real property or on
 a business opportunity. . . .

1 3. Defalcation.

2 "Defalcation is defined as the 'misappropriation of trust
3 funds or money held in any fiduciary capacity; [the] failure to
4 properly account for such funds." In re Lewis, 97 F.3d 1182, 1186
5 (9th Cir. 1996) (citation omitted). Defalcation is broadly defined
6 to include any behavior by a fiduciary, including innocent,
7 negligent, and intentional defaults of fiduciary duty resulting in
8 failure to provide a complete accounting. See FDIC v. Jackson, 133
9 F.3d 694, 703 (9th Cir. 1998) citing In re Lewis, 97 F.3d at 1185.

10 Debtor, acting within the scope of her licensed activities,
11 failed to record Stevens' trust deed as part and parcel of the
12 transaction, which she structured for the apparent motivation of
13 keeping her commission intact. Debtor took advantage of Stevens by
14 soliciting a loan, which benefitted her, and then did not protect
15 Stevens' position. Whether her failure to record the trust deed
16 was innocent, negligent or intentional is immaterial under Ninth
17 Circuit law. The broad definition of defalcation includes "any
18 behavior" of a fiduciary that results in the failure to provide an
19 accounting. Debtor has failed to account for Stevens' loss through
20 her apparent inattention to the timely recording of Stevens' trust
21 deed. see In re Stephenson, 166 B.R. 154, 160 (Bankr. S.D. Cal.
22 1994) (loss suffered by unauthorized investment of funds
23 constitutes defalcation and nondischargeable debt under
24 § 523(a)(4)).

25 The Court finds that Stevens established in the arbitration
26 the identical facts and issues that would have to be established in
27 the bankruptcy court in the § 523(a)(4) action. Accordingly, the
28 doctrine of collateral estoppel precludes the re-litigation of such

1 facts and issues in the bankruptcy court.

2 4. Fraud.

3 Stevens contends that the Arbitrator found Debtor committed
4 fraud. In support of this contention, Stevens points out that the
5 Arbitrator's award mentions the word "scheme" in the discussing
6 Debtor's actions. This Court cannot find that the word "scheme"
7 amounts to a finding of fraud. Moreover, the Arbitrator's award
8 specifically states that "[t]here is no evidence that [Debtor] knew
9 the IRS lien was coming or that [Debtor] intended to defraud or
10 prejudice the Stevens." Nonetheless, the elements of fraud were
11 not addressed, much less established in the arbitration proceeding.
12 Therefore, collateral estoppel does not apply to the issue of
13 fraud.

14 In sum, the Court grants Stevens' motion for summary judgment
15 on the grounds that collateral estoppel applies to the issues of
16 Debtor's fiduciary relationship with Stevens, the existence of a
17 trust res, and Debtor's failure to account for losses. There are
18 no genuine issues as to any material fact which must be established
19 for defalcation while acting in a fiduciary capacity under §
20 523(a)(4). The Court denies Stevens' request for summary judgment
21 on the issue of fraud as genuine issues of material fact remain.

22
23 CONCLUSION

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25 This Memorandum Decision constitutes findings of fact and
26 conclusions of law pursuant to Federal Rule of Bankruptcy
27 Procedure 7052. Stevens is directed to file with this Court an
28 order in conformance with this Memorandum Decision within ten (10)

1 days from the date of entry hereof.

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3 Dated: December 14, 1998

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JOHN J. HARGROVE
United States Bankruptcy Judge

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